IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

ROAD IMPROVEMENT DISTRICT NO. 1 OF FRANKLIN COUNTY, ARKANSAS; M. B. CONATSER, F. W. GREER, ET AL., ... *Appellants*

v. No. 250.

MISSOURI PACIFIC RAILROAD COMPANY ..... *Appellee*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS.

JURISDICTION OF THIS COURT.

This is an appeal by Road Improvement District No. 1 of Franklin County, Arkansas, and the commissioners thereof from a decree of the United States Circuit Court of Appeals for the Eighth Circuit (R. 178-179). That decree and opinion which was rendered and filed September 19, 1924, (R. 174, 175, 176, 177, 178, and decree thereon entered Oct. 6, 1924, R. 178), (reported in 2 Fed. p. 340) affirmed a decree of the United States District Court, for the Western District of Arkansas, Fort Smith Division, rendered on the 26th day of April, 1923,

(R. 39, 40, 41) making permanent and perpetual a restraining order forever enjoining and restraining the said Road Improvement District No. 1, of Franklin County and the commissioners of same, and their successors, and those acting under them from collecting or attempting to collect a tax assessed and extended against the property of the appellee, Missouri Pacific Railroad Company, on an assessment made against it for the purpose of constructing and improving a highway within the limits of said road improvement district, and cancelling and setting aside said assessment, upon the ground that said assessment as made was palpably arbitrary and discriminatory, and resulted in a denial to the appellee of equal protection of the laws and was violative of the constitution of the United States. The amount in controversy exceeds one thousand dollars besides cost (R. 2).

This court has jurisdiction, and the appeal from the Circuit Court of Appeals was properly taken:

Judicial Code Sec. 241 (as existed prior to going into effect of act February 13, 1925).

Huguley Mfg. Co. v. *Galeton Cotton Mills*, 184 U. S. 290.

Branson v. *Bush*, 251 U. S. 182.

STATEMENT OF THE CASE.

Road Improvement District No. 1 of Franklin County, Arkansas, is a special road improvement district, having been created by act No. 588 of the acts of the general assembly of the State of Arkansas at its regular 1919 session, for the express purpose of constructing and improving a certain highway through Franklin County. The act among other things provides for the construction of the highway, names certain commissioners to carry out its provisions, and provides for assessments of benefits against all real property and all railroads and tramroads, telegraph and telephone lines and pipe lines right-of-way situated within the limits of the district as defined by the act and provides the necessary machinery for the selection of an assessment board to determine and fix the assessment of benefits against all such property within the district; the said act contains a provision that any person or corporation aggreived by any such assessment of benefits shall have twenty days after the assessment is finally made to start proceedings in any court of competent jurisdiction to contest same (R. 3, 4, 5, 6). Proceeding under

the terms of this act the contract for the building of the road, approximately twenty-four miles in length was let, assessors were appointed and benefits determined upon by them were duly assessed against all the lands, railroads, etc., within the boundaries of the district. This improvement district contains within its limits approximately forty-two miles of railroad track and right-of-way, as well as depot and other property belonging to the Missouri Pacific Railroad Company, and an assessment of benefits against this property of the appellee was fixed and determined upon by the assessment board in a total amount of $54,082, while the total benefits assessed against all property in the district amounted to $504,000 (R. 7).

The total assessed valuation of all real property within the district for the purposes of general taxation amounted to $1,754,000, of which total amount $711,325, represents the assessed valuation of the property of the Missouri Pacific Railroad Company in the district (R. 62). In making the original assessment of benefits the board of assessors took as a general basis as to all real property, including that of the railroad company, the assessed valuation for general taxation purposes and the location of the property in reference to the highway and considering the inequalities in assessment for general purposes with this as a starting basis formed their judgment as to the benefits that would accrue to the property by construction of the highway based upon the benefits that they found would accrue to each item of property, including that the railroad company (R. 110, 113, 114, 115, 116). As to the railroad property they considered that by reason of this improvement the country would develop more, there would be more settlements, more people come in and they would have to have material, building material and various things that would result in increased traffic to the railroad, and that the railroad would be actually benefited to the extent of the assessment, and benefited in its actual business of carrying freight and passengers, and that since the completion of the road there had been an actual increase from observation (R. 116, 117, 118, 119).

After this original assessment had been made and notice given of the fact, and a hearing had before the board of assessors, as provided in said act, and the said assessments against the property of the appellee made final, the appellee brought its suit in equity in the United States District Court for the Western District of Arkansas against the road district and its commissioners attacking the assessment upon various grounds, all of which appear to have been abandoned except

the contention that the assessment against the property of the appellee was unfair and palpably arbitrary and confiscatory, and amounting to a confiscation of property in violation of the fourteenth amendment to the constitution of the United States (R. 2).

Thereafter, at the 1921 session of the general assembly of the State of Arkansas, act No. 626, approved March 29, 1921, was passed. This act approved and confirmed the assessment of benefits originally made against the property of the appellee in the sum of $54,062, as well as the assessments originally made against all other property in the district, and provided further for an increase in such assessments of benefits. In the meantime a proposition in writing was submitted by the railroad company to the commissioners of the district to pay the sum of $250 per mile, making an approximate total of $8,000, in full settlement of the assessment against its property. This proposition was tentatively accepted by the commissioners (99,100,101) but was not concurred in by the board of assessors. This proposition was made prior to the passage of the act of 1921.

Proceeding under the authority of this act, on account of certain changes in the improvement, and in order to raise funds therefor, the benefits against the said railroad property of the appellee were re-assessed, and made in the sum of $75,686, and a corresponding re-assessment and change was made as to all other property in the district, and thereafter, by act 109, approved February 12, 1923, the general assembly of the State of Arkansas ascertained and found such re-assessment of benefits to be in all respects fair, equitable and proportionate, and fixed and established same as a legislative determination of benefits. This act was also attacked by the amended and substituted bill filed by the railroad company.

On the trial of the case in the district court it was the contention of the railroad company that the highway paralleled the railroad and on account of the use of automobiles and motor trucks would take traffic from it, and would become a detriment rather than a benefit, but the testimony introduced by it failed to disclose that condition. Several officials of the railroad, including members of the traffic department, were introduced as witnesses, and while they testified that the building of improved highways parallel to a railroad would take some traffic from the railroad on short hauls, yet they admitted that the construction of the highway would improve the country generally, and thereby result in an increased business for the railroad on its through traffic and

long hauls (R. 77, 82), and the testimony tended to show that these short hauls of which they would be deprived do not constitute profitable business for the railroad and are often carried at a loss (R. 86, 87).

The railroad company introduced as witnesses two of the three assessors who made the original assessment of benefits, and the three who made the re-assessment, and each of them testified that they made the assessment against the property of the railroad company on the same basis as all other property in the district and that in their judgment the railroad would be benefited in the amounts assessed against it (R. 109, 115, 117, 123, 144, 149).

SPECIFICATION OF ERRORS.

The assignments of error relied upon and urged by the appellants are as follows (R. 179, 180):

First. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that act No. 626 of the general assembly of the State of Arkansas of the year 1921, and act No. 109 of the special acts of the general assembly of the State of Arkansas of the year 1923, fixing, confirming and validating the assessment of benefits against the property of the appellee, Missouri Pacific Railroad Company, as they apply to said railroad company, and each of them, are arbitrary, unwarranted and reflect a confiscation of the property of appellee.

Second. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that said acts, and each of them, are in conflict with the fourteenth amendment to the constitution of the United States.

Third. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in finding and holding that the assessment against the real estate of the appellee, Missouri Pacific Railroad Company, is on a mileage basis, and erred in its finding and holding that the assessment against other real estate is upon an area basis at a certain amount per acre, dependent upon distance from the highway constructed, and erred in finding and holding that this method of assessment, as confirmed and validated by said acts of the general assembly, is palpably arbitrary and discriminatory and results in a denial to the railroad company of equal protection of the law.

Fourth. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in finding and holding that the highway

improvement would be a detriment rather than a benefit to the railroad company, and that a benefit accruing to the railroad would be so speculative as to be unascertainable.

Fifth. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in not finding and holding that the terms and provisions of the act of the general assembly of the State of Arkansas for the year 1923, being act No. 109, approved February 12, 1923, fixing, confirming and establishing the benefits assessed against the real property in the appellant district including that of seventy-five thousand and six hundred and eighty-six dollars against the real property of the appellee is binding and controling as a legislative determination of benefits against the property in the road district, including that of appellee.

Sixth. That in any event the Circuit Court of Appeals for the Eighth Judicial Circuit erred in not finding and holding that the railroad company was at least liable for an assessment of two hundred and fifty dollars per mile, which the railroad had tendered and insisted in its complaint and prayer for relief, should be accepted as the basis of assessment against it.

Seventh. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that the evidence in this cause fails to show that the railway company derives any benefit from the building of the road constructed by the appellant, road district.

ARGUMENT.

We think that the several specifications of errors herein can be covered by a brief argument of the following propositions:

(a). The basis of assessment against the property of the railroad, as made by the assessing authorities of the ditrict, was fair and reasonable, and was upon the same basis as that of other real property in the district. The only discrimination appearing to have been made in favor of the railroad company.

(b). The benefits were fixed and determined by the legislature of the State of Arkansas, and the proof does not show that this assessment, as made against the property of the railroad company, was palpably arbitrary and amounts to a mere confiscation of property so as to entitle the appellee to the injunctive relief sought herein.

(c). That the contention of the railroad company that the highway constructed paralleled its line of railway and will operate as a competitor to it, and therefore not be a benefit but a detriment, is not supported by any fact in the record, but on the contrary it is conclusively shown that it will be a benefit, and that the railroad will enjoy a general increase in its profitable business that will much more than offset its loss of short hauls, if any, which are shown to be unprofitable and upon the whole undesirable.

(d). That in no event should the property of the railroad company be permitted to entirely escape taxation for this public improvement, and if the assessment as made and determined upon by the assessing authority of the district and confirmed by the legislature is found to be excessive, the same should be reduced to a just and reasonable basis.

THE BASIS OF ASSESSMENT.

It is our contention that the legislative determination of benefits is controlling in this case and that whatever error of judgment or otherwise that may have been made by the assessing authorities of the district in originally fixing the benefits to accrue to the property of the railroad by the construction of the highway is cured thereby yet we first wish to call the court's attention to the basis upon which this assess-

ment was made as disclosed by the undisputed proof in the record.

We are unable to find any view under which the finding of the District Court, for the Western District of Arkansas, in its finding No. 2, which was sustained by the opinion of the Circuit Court of Appeals (R. 40), that the assessment against the real estate of the defendant is on a mileage basis. The valuation for general taxation is taken. The assessment against other real estate is upon an area basis at a certain amount per acre, dependent upon distance from the highway contemplated. This method of assessment is palpably arbitrary and discriminatory and results in a denial to the defendant of equal protection of the laws." The only testimony upon this proposition is that of the members of the respective assessing boards, who were introduced as witnesses by the railroad company. The testimony of each of them, without exception, was that the assessment against the railroad and the other real estate of the district was made upon the same basis, and that in fixing the assessment of benefits against farm lands and town property they did not use an area basis to fix it at so much per acre, but that they took as their general basis for fixing the benefits the valuation of the property as it was shown upon the tax books for general taxation purposes, and considering the improvements upon the land and its proximity to the highway, they fixed the assessments at what they, in their judgment, were convinced the benefit would be to each respective tract. That they did not take this valuation as shown by the tax books as an absolute basis, but that they were familiar with the lands of the district and the improvements thereon, and in the exercise of their judgment, if they found that the tax books did not reflect the true value, they placed a correct valuation either higher or lower, upon the land and improvement for the purpose of determining the benefits. That in fixing the benefits against the railroad property they accepted the same basis of value as shown by the State Tax Commission, which as applied to railroad property was the assessing authority. That exercising their best judgment and discretion, it was their opinion, when fixing the benefits, and when testifying that the property of the railroad company would be benefited the amount assessed against it, and that the assessment was just and fair, and for that reason they made it. This was the effect of the testimony of the members of the assessing board: Will Hill (R. 109, 117), John Mosley (R. 115), Ed B. Melton (R. 123), John T. Donald (R. 144), C. E. Horton (R. 149).

Will Hill, one of the assessors, testified (R. 110):

"Q. Mr. Hill, I wish you would state to the court by what process you arrived at the assessment of benefits against the property of the Missouri Pacific Railroad?

A. We taken the collectors book as a guide for the valuation of the taxes of the county.

Q. But the tax books as shown by the books in the hands of the collector, the assessment for general taxation purposes was the basis upon which the benefits were assessed?

A. Yes sir, that was our basis for a guide.

THE COURT: Mr. Hill, you took the tax books, as I understand, and ascertained what a particular piece of land was assessed at for general tax purposes, State and county?

A. Yes sir.

Q. Now if you conceived that that land was not assessed for those purposes at a sufficient valuation you raise it?

A. Yes sir.

Q. In order to apply the benefits?

A. Made a fair equalization of the assessments as we considered.

Q. Did you lower any of the valuations?

A. Just in a few instances. We found a few tracts that was a little excessive we thought.

Again this witness testified (R. 113):

Q. The real property of the railroad company then was assessed in the same way that the real property of the other property in the district was assessed for benefits according to the zone that it occupied?

A. Yes sir, with this exception. We did not change the valuation of their property.

And again (R. 114):

Q. Now Mr. Hill, did you, assisting the board, exercise your best judgment and discretion about these assessments and arrive at that in the way you did, and make these assessments, believing them to be fair and equitable of the benefits received?

A. We did.

Q. Was it your opinion, and is it your opinion that the assessment of benefits made by your board against the property of the railroad company is just and fair?

A. We thought so.

Q. And for that reason you made it?

A. Yes sir.

Q. Believing in your opinion that it would receive that amount of benefits?

A. Yes sir.

This is substantially the testimony of the other assessors, John Mosley, Ed B. Melton, John T. Donald and C. E. Horton. The testimony of these witnesses, the only ones to speak upon the subject at all, is clear and positive that no lands or property in the district were assessed upon an "area basis at a certain amount per acre." We submit therefore that there is no fact in proof from any witness upon which the finding of the district court that this was done, could possibly be sustained.

In its finding No. 1, the district court found that "the assessment against the property of the railroad company includes personal as well as real property, the inclusion of personal property is unlawful." It is true that there was some testimony tending to show that of a total assessment of $711,325, as shown by the assessment for general taxation purposes against the railroad, the amount of $52,465 was on personal property or rolling stock, and this might have called for a proportionate reduction of the benefits if it were not for other facts to which we wish to call the court's attention.

In the first place as shown by the record, and as computed by the plaintiff's engineer, Mr. Warden, in his testimony, the total assessed valuation of all real property in the district was $1,754,000, and that of this total valuation $711,325 belonged to the Missouri Pacific Railroad Company (this valuation of the railroad's property at $711,325 included the $52,465 claimed by it to be personal property), showing that the railroad company on this basis owned 41.7 per cent of the total of all the property in the district. That the total amount of all benefits assessed against this $1,754,000 total valuation was $575,421.35; that of these benefits an amount of only $75,686 was assessed against the property of the railroad company, that is only 13.2 per cent of the total benefits assessed against all of the property of the district was assessed against the property of the railroad company (R.

61, 62, 63). A further computation on this basis shows that the railroad company was only assessed benefits totaling approximately 10.6 per cent of the total assessed value of its property in the district, while all other property in the district was assessed an average of approximately 47.7 per cent of its assessed valuation, so, allowing for any deduction that should be made by reason of the small item in these figures claimed by the railroad to be personal property, it would still leave the benefits assessed against the railroad's actual real estate within the district, less than 25 per cent of the average benefits assessed against all other real property in the district. In this connection the testimony shows that the property of the railroad company is assessed for the purpose of general taxation at about 50 per cent of its actual value, and that the other real property in the district is assessed at from 35 to 65 per cent of its actual value, or an average of approximately 50 per cent.

In the case of *Saint-Louis-San Francisco Railroad Company* v. *Sebastian Bridge District*, an Arkansas case, decided by the Circuit Court of Appeals for the Eighth Circuit on September 14, 1923, in error to the District Court of the United States for the Western District of Arkansas, 293 Fed. p. 729, the court of appeals said:

> "The statute required the assessment to be made upon the basis of actual benefits. The evidence is overwhelming that the method pursued by the assessors is as follows: They regarded the bridge as a benefit to the entire district and all of the real estate in it, in an amount equal to the cost of the bridge. That without any consideration of benefits to particular tracts, and ignoring any differences or consideration of position, location, relation to the improvement or usage, they determined the actual value of all real estate tracts, and then declared a benefit of 10 per cent thereon—the actual assessment being slightly over 41 per cent of this benefit; in short, they estimated 'the community benefit' to equal the cost, and then spread this benefit horizontally on all the real estate in the district on the basis of the value of such property. Undisputed testimony was that proximity to the bridge would affect the benefit therefrom. There was not the slightest attempt to separately consider and determine benefits to particular tracts or to tracts in particular localities. It is clear therefore that the method of assessment required by the act was not followed, but that the assessors, with good intentions, but none the less erroneously, adopted and carried out a different method of

their own. They had no authority to do otherwise than as the legislature had directed them. All of their power came from the act creating the district, and they must stay within such granted powers.

"But does this conclusion necessitate a reversal of the case? Such a decision could affect only the right of this plaintiff in error. Others who have been assessed and are not contesting the assessment can waive the illegality thereof, and this contestant is not concerned therewith, and has no right to demand a re-assessment of such other lands.

"Courts should refuse to decide constitutional points unless the party raising them is injured by the threatened action, which is claimed to be invalid. Here the railway is not discriminated against because it was actually assessed upon the same basis and the same rate as all other real estate, and the jury found as a matter of fact that no discrimination against this plaintiff in error existed. See *Milheim* v. *Moffat Tunnel Improvement District*, 43 Sup. Ct. 694, decided by the supreme court on June 11, 1923 on the last point (appraisal of benefits) discussed therein. Also it was not injured by the fact that it with all others was assessed upon an erroneous basis, since the jury has found that the actual benefits (which was the proper assessment basis) equals the benefits found under the erroneous method. Again, if we ordered simply that the assessment of this railway be according to the actual benefits as required by the act, the result would clearly be the same as has been reached here, since two of the three assessors have expressed in this record their conviction that the benefits equaled this assessment.

"It is also clear that this plaintiff in error could not and should not entirely escape assessment for this improvement. Even if the method of assessment was so erroneous, because not the one required by the act, as to vitiate any possible assessment of this railway under the existing law, yet the legislature could rectify this by requiring re-assessment of this property. Citing *Lombard* v. *West Chicago Park Commissioners*, 181 U. S. 33, and other cases. In view of the foregoing, we should as to this point, decline to consider the constitutional question, because no injury is shown, and an order would be of no practical benefit to this objector."

In the above case the assessors of the bridge district took as a basis the assessment for general taxation purposes

made by the State Tax Commission, as did the assessors in the instant case. The Circuit Court of Appeals found that there were certain errors in taking this basis, and modified the assessment to that extent.

We submit that in the case at bar the assessing authority, as shown by the undisputed testimony, used the same basis for fixing the assessment of benefits against the railroad property as against the other property in the district, with the exception that the property of the railroad company was assessed at a much less proportionate figure than that of the other property, and if any discrimination is shown it is in favor and not against the railroad, and it is no attitude to complain. Each of the assessors put upon the stand by the appellee testified that, exercising their honest judgment, the benefits accruing to the railroad equaled the amount of the assessment.

THE BENEFITS FIXED BY LEGISLATIVE DETERMINATION.

Under the issues involved here we do not deem it necessary to set out the original act No. 588 of the acts of the general assembly of the State of Arkansas for the year 1919, creating and establishing the appellant, improvement district, as it is quite lengthy, and there is at this time no question of its validity involved. It is sufficient to say that this act provided for the construction of the improvement and directed and assessment of benefits therefor against the "lands, railroads, tramroads, telegraph lines, telephone lines and pipe lines within the district—". However, the legislature of the State of Arkansas, at its 1921 session, passed act No. 626, which act is to be found at pages 1255-1259 of the official volume of the special acts of that session, the same being approved March 29, 1921. So much of said act as is applicable to the question here reads as follows:

"Section 1: That the assessments of benefits heretofore made in Road Improvement District No. 1 of Franklin County, under the terms and provisions of act No. 588 of the acts of the general assembly of the State of Arkansas for the year 1919, approved April 1, 1919, and approved by the county court of Franklin County on the 9th day of August, 1919, be and the same is hereby found to be fair, equitable and just as made, and is hereby in all things confirmed, and declared to be the benefits accruing to the property therein assessed by reason of the improvement as contemplated at that time. The same

being as against the Missouri Pacific Railroad Company, the sum of fifty-four thousand and sixty-two ($54,062.00) dollars; Western Union Telegraph Company $625.00; Home Telephone Company $500.00; Commonwealth Public Service Company $3,125.00; Sanbeau Mine $250.00; Denning Domestic Coal Company $250.00; Meece & Hackney Coal Company $375.00; Mansfield & Kindrick Coal Company $500.00; Dodson Mine Nos. 1 and 2, $750.00; Western Coal & Mining Company Mines Nos. 2 and 6, $750.00; Denning Coal Company $625.00; Ozark Coal Company $250.00; Harbottle Biley Coal Company $188.00; Liberty Coal Company $125.00; Wallace & McKinney Coal Company $375.00; Southwestern Bell Telephone Company $1,000.00; Alis Gin Company $313.00; and as against the several tracts of land not herein specifically mentioned as shown on said assessment as filed and approved as aforesaid."

Section 2 of this act provides for a re-assessment of benefits in the event it should become necessary by reason of the widening of the road or otherwise. Which re-assessment was found necessary, and made by the assessors, and amounted to an increase of practically forty per cent against all the property of the district, and thereby increasing the assessment against the property of the railroad company to $75,686. This re-assessment was made necessary by reason of changes in the original plan of improvement, widening the road and otherwise, which resulted in a material increase in the cost (R. 134, 135). Thereafter at the 1923 session of the State legislature, another bill was passed for the relief of this road district. This act was approved by the governor and became a law as act 109, on February 12, 1923, and is to be found on pages 205-209 of the official volume of the special acts of the 1923 session of the general assembly. So much of this act as it is pertinent here is as follows:

"Section 1. That the creation, formation and establishment of Road Improvement District No. 1 of Franklin County, Arkansas, under and by virtue of the terms and provisions of act Number 588 of the acts of the general assembly of the State of Arkansas for 1919, approved April 1, 1919, be and the same is hereby in all things confirmed, validated and approved.

"Section 2. That the assessment of benefits as against the several and particular tracts of land, railroads and tramroads, telegraph lines, telephone lines, electric lines and pipe lines, in said district, as re-assessed under the terms and provisions of act No. 626 of the acts of the general assembly of the State of Arkansas for the year 1921, approved March 29, 1921,

the same being entitled 'An act for the relief of Road Improvement District No. 1, of Franklin County, for Confirming the assessment of benefits therein, and providing for changes therein, and providing for a referendum therein, and for other purposes', and filed in the office of the county clerk in and for the Ozark District of Franklin County, as of the 20th day of October, 1921, be and the same is hereby found and declared to be fair, just, equal and proportionate; the said re-assessment of benefits is further found to be based upon the improvement in said district as at that time planned and laid out, and as finally made, and said re-assessment of benefits is hereby fixed, confirmed, approved and established and declared to be the assessment in and for said district and to be the benefits that have and will accrue to the property therein assessed by reason of the improvement as contemplated at the time of making and filing such re-assessment, and as finally made.

"Section 3. It is hereby, by the general assembly, ascertained and found that said re-assessment of benefits, as filed on the 20th day of October, 1921, and as same now appears upon the assessment roll and books of said district, showing said re-assessment, and being as against and upon the railroad, track, right-of-way, switches, sidetracks, and other real property connected therewith, and located in said district, of the Missouri Pacific Railroad Company, the sum of $76,686.00 (seventy-five thousand six hundred and eighty-six and no one-hundredths dollars); the electric lines, poles, substations, easements right-of-ways, and other interest in real property of the electric lines in said district, now held and operated by the Mississippi Valley Power Company, the sum of $4,375.00 (four thousand three hundred seventy-five and no one-hundredths dollars); and as against and upon all other tracts of land, railroads and tramroads, telegraph lines, telephone lines; electric lines and pipe lines, within said district, not herein specifically mentioned, as same appears and is shown to be re-assessed upon said assessment roll and books, is in all respects fair, equitable and proportionate, and to be based upon the improvement as made in said district; and same is found in each particular instance to be the benefit accruing, by reason of such improvement, to each tract of land, railroad, tramroad, telegraph line, telephone line, electric line and pipe line within said district; and said re-assessment of benefits is by the general assembly hereby fixed, established and declared to be the assessment of benfits in and for said improvement district.

"Section 4. That said re-assessment, hereby made and fixed as the assessment of benefits in said district, shall not

be set aside or declared void by any court on account of any defect in description of property or naming the owner thereof, irregularity in the proceedings, or any former action of any board of commissioners or assessors, and this act shall be liberally construed so as to make the lien of the said assessment valid and prior to other liens."

It is affirmatively shown from the record that all requirements of the State constitution as to the giving of notice of the intended introduction of this bill and the exhibition of the notice in the general assembly were fully complied with (R. 162, 163, 164, 165).

The district court did not undertake to find that the legislative determination of benefits against the property of the appellee, under the provisions of these acts, was wholly unwarranted, a flagrant abuse of authority or confiscatory; but merely found that the method of assessment employed by the assessing board of the district was arbitrary and discriminatory because made upon a different basis from that used in assessing other real property in the district. This finding as we have contended and argued heretofore, is itself clearly against the manifest weight of the evidence; but what ever may have been the course of action or conduct pursued by the board in making the assessment, we maintain that the act of the legislature of the State of Arkansas fixing, establishing and confirming an assessment of benefits definitely and specifically fixed in the act itself is controlling here and must be given full effect under numerous decisions, not only of the Supreme Court of the State of Arkansas but this court as well, unless it is affirmatively shown that the legislature in fixing the assessment acted arbitrarily and capriciously in such a manner as to cause the assessment against complainant's property to amount to mere confiscation. This well established rule was laid down by this court in the case of *Branson* v. *Bush*, 251 U. S. 182, 189, and has since been generally followed. In the case of *Milheim et al* v. *Moffat Tunnel Improvement District et al.*, 262 U. S. 710, 43 Sup. Ct. 694, the court, speaking through Mr. Justice Sanford, said:

> "It is well settled however, that if a proposed improvement is one which the State has authority to make and pay for by assessments on property benefited, the legislature, in the exercise of the taxing power, has authority to determine by the statute imposing the tax what lands may be and are in fact benefited by the improvement; and if it does so, its determination is conclusive upon the owners and the court, and cannot be

assailed under the 14th amendment unless it is wholly unwarranted and a flagrant abuse, and by reason of its arbitrary character is mere confiscation of the particular property."

In the case now before the court the legislature, in the original act creating the district, determined what property would be benefited, including the railroads. After the assessment was made, the legislature passed an act confirming it and specifically finding that the assessment as fixed, was in each instance the benefits accruing to each respective item of property. The legislature could have originally fixed the assessment of benefits, and with the same force and effect could fix or confirm an assessment already made, and the mere fact that an assessing board may have made a mistake in judgment, or used an erroneous basis for making the assessment against any portion of the property, would in no wise affect the validity and force of the legislative determination or confirmation. This rule has been given effect in many cases by the Supreme Court of Arkansas. In the cases of *Tims* v. *Mack* and *Mason* v. *Mack*, 147 Ark. p. 112, the court said:

"We have held in a long line of cases, beginning with *Sudberry* v. *Graves*, 83 Ark. 344, that the lawmakers, in providing for assessments upon land for the construction of local improvements, 'may act directly, determining the area to be benefited, and the rate of opportionment, or may levy assessments directly, fixing the amounts and determining the benefits to accrue, and that the determination of the legislature in these matters will be respected by the courts,' and that the ratification by the legislature of assessments already made is tantamount to an assessment made by the legislature itself. We held in those cases that the legislative determination was not subject to review by the courts for mistakes of judgment, but that only an arbitrary abuse of the power would be controlled (citing cases).

The theory on which these decisions is based is that the lawmakers have in their own way ascertained and determined the facts, and their decision is conclusive upon the courts, unless it appears that such decision, is on its face, arbitrary and demonstrably erroneous. The legislature may adopt its own method of ascertaining the facts. It is not bound by any fixed rules of evidence in conducting the inquiry. It cannot therefore be said that it was physically impossible for the legislature to have inquired into the facts in regard to the correctness of the assessment of benefits made by the board of assessors.

It is not proper for us to make inquiry into the method by which the members of the legislature satisfied themselves as to the correctness of these assessments, but we conclusively presume that they did make such inquiry."

In the case of the *Kansas City Southern Railway Co.* v. *Road Improvement District No. 3, Scrier County*, 156 Ark. Sup. Ct. Reports p. 116-119, the Supreme Court of Arkansas said:

"An affirmance of the judgment in this case might be rested entirely on the confirmation of the assessments by the statute cited above (being an act confirming assessment of benefits previously made), there is no reason shown why the statute is not applicable, for we have decided that even during the pendency of litigation a statute may be enacted ratifying and confirming assessments (citing cases). This statute constitutes a legislative determination of the correctness of the assessment, and that decision will not be overturned unless found to be obviously and demonstrably erroneous."

The judgment of the Arkansas Court, in this case, was affirmed by this court on the 15th day of December, 1924, 45 Supreme Court Reporter 136, 140. Mr. Justice Van Devanter, in delivering the opinion said:

"By a long line of decisions in this court it has been settled that, where the State constitution as construed by the State court of last resort does not provide otherwise, the legislature of a State may require that the cost of a local public improvement, such as the construction or reconstruction of a public road, be distributed over the lands particularly benefited and charged against them according to their value, their area, or the benefits which they will receive; may itself determine what lands will be benefited, and what proportion they will share in the benefits; and may avail itself, for the purpose of that determination, of any information which it deems appropriate and sufficient, including such as may be afforded by reports and estimates made in prior assessment proceedings having the same object. Only where the legislative determination is palpably arbitrary, and therefore a plain abuse of power, can it be said to offend the due process clause of the fourteenth amendment (citing a long list of cases). And only where there is manifest and unreasonable discrimination in fixing the benefits which the several parcels will receive can the legislative determination be said to contravene the equal protection clause of that amendment. *Kansas City Southern Ry. Co.*

v. *Road Improvement District No. 6*, 256 U. S. 658, 41 S. Ct. 604, 65 L. Ed. 1151; *Thomas* v. *Kansas City Southern Ry. Co.* 261 U. S. 481, 43 S. Ct. 440, 67 L. Ed. 758.

"To justify an assessment of benefits to particular lands it is not essential that the benefits be direct or immediate. *Valley Farms* v. *Westechester County supra.* But is essential that they have a better basis than mere speculation or conjecture. In the case of railway property they may consist of gains from increased traffic reasonably expected to result from the improvement. *Thomas* v. *Kansas City Ry. Co., supra; Branson* v. *Bush, supra.*"

In the above case the railroad had only two miles of main line, nine miles of sidetrack and depot and other buildings within the road district, the assessed valuation for general taxation purposes of which amounted to only $129,615, and benefits were assessed and approved against this property and valuation amounting to $21,270, or approximately 16 per cent of its total assessed value. While in the case at bar the appellee has within the limits of the district a total mileage of approximately forty miles as well as depot and other necessary buildings, of an assessed valuation of in the neighborhood of $700,000, and is assessed total benefits of less than 11 per cent of its assessed valuation and less than 14 per cent of the total benefits assessed in the entire district notwithstanding the fact that it owns more than 47 per cent of the total assessed valuation of property therein. Surely it can not be successfully urged that in view of these undisputed facts that the legislative determination of benefits against the property of the Missouri Pacific Railroad Company is wholly unwarranted and a flagrant abuse, or by reason of its arbitrary character, a mere confiscation of the property assessed, so as to offend against any provision of the constitution of the United States. To the contrary such is the character of proof as made out by the testimony, offered in the trial court, on the part of the appellee that we are convinced that even in the absence of the legislative determination the assessment, or at least a portion of it, should be permitted to stand. Not a witness introduced but who admitted that the railroad would be benefited by the building and improving of the highway. True a number of witnesses connected with the traffic department of the railroad testified that in some instances where hard surfaced highways had been built paralleling a railroad it had resulted in a loss of some traffic in small packages and on short hauls; but they all conceded that the building of the highway and the resultant upbuilding and improvement of the country would of necessity bring an ultimate increase of gen-

eral business of the railroad, which it appears from the testimony, would far more than offset whatever loss might be sustained in reference to small business and short hauls. In fact it is strongly indicated from the testimony of C. E. Carstarphen, division agent of the Missouri Pacific Railroad Company for thirty-five years, and having direct charge of traffic, that these short hauls are unprofitable business to the railroad company, and are carried frequently at a loss, incidentally to their general and more profitable business (R. 86, 87, 88).

Q. The long hauls can be carried much more cheaply in proportion than the short hauls can they not?

A. They are, yes.

Q. Those short hauls and this short transportation are expensive hauls to the railroad company are they not?

A. Yes sir.

Q. So that they are not regarded profitable to the company, are they?

A. Yes, we like that business very well.

Q. But you often do it at an expense in order to keep up your general through business?

A. Well, probably so yes.

Q. You carry freight between local points frequently at probably a loss to that particular business, but it is to keep up your general business?

A. I think so.

Q. Let me ask you this question: The building of a highway, that is, a good road in a community, helps the development of the country?

A. Yes sir.

Q. Well, whatever helps to benefit the community helps to benefit the railroad?

A. It should, yes sir.

Q. It does, doesn't it?

A. I don't know that it would increase their local business any.

Q. I am not talking about the local business. I am talking about the business that it does as a common carrier of

freight and passengers from all points it serves, to all the points it serves?

A. Well, I would say yes.

Q. If the country is developed that is served by the railroad then that necessarily inures to the benefit of the railroad in the way of business, doesn't it?

A. Yes sir.

Q. If the line of road other than the railroad which helps to develop a country parallels the railroad, it may take away some local business, but it helps develop the country and thereby benefits the railroad in its general business, doesn't it?

A. Yes sir.

Thus it will be seen that the railroad company, after having exhausted all of its available testimony from its skilled and experienced engineering and traffic department to support its attack upon this assessment, has been able to show at most only a probable loss of a portion of its unprofitable business. Surely it cannot be said that this was sufficient an attack under the 14th. amendment, and especially so when further taking into consideration the fact that the employees of the plaintiff's traffic department that undertakes to give an opinion upon the subject at all, admit that the building of this highway will result in the upbuilding and improvement of the community served by the railroad, and in turn, as a natural consequence, result in a general increase in the business of the railroad, at least upon its longer and larger hauls and more profitable business.

Aside from its own employees, every witness that the railroad introduced positively testified that the building of the highway would result, not only in a general improvement of the country but in the business of the railroad as well, and that in their opinion the railroad would be benefited fully as much as the assessment against it. Such is the effect of the testimony of J. S. Turner (R. 99, 192), M. B. Contaser (R. 103, 106), Will Hill (R. 109, 115, 117, 122), John Mosley (R. 115, 117), Ed B. Melton (who was at the time of testifying and had been for many years an employee of this railroad company and also one of the assessors for the district) (R. 123-129), John T. Donald (R. 144-148), C. E. Horton (R. 149-155); each one of these witnesses was introduced by the railroad company and each of them gave it as his opinion, based upon facts detailed by them, the railroad company would be benefited at least as much as the assessment of benefits made

against its property. Some of them testified that these benefits were already apparent, that from observation the railroad was doing a bigger business within the district, and that the country generally was rapidly improving; orchards were being put out, and fruit of which would be transported by the railroad; many new buildings were being erected, the material for same being hauled by the railroad; all due to the building and improving of this highway. That large acreage of berries were being planted along the highway, and the community being otherwise improved and advanced by reason thereof. That as a direct result of the building of this highway, lateral roads were being constructed leading from the interior to this road and from there into the various stations and shipping points along the Missouri Pacific Railroad. And it was further shown that the railroad company had received in freight for material used in the construction of this road a sum of money almost equal to the total assessment against it (R. 131).

PARALLEL HIGHWAY.

Much stress is placed by the appellee upon the fact that the highway improved and constructed by the district is parallel to its line of railway. It is clearly shown (R. 129-144) that the effect of this highway, while it parallels the railway at places, is not that of a parallel road; that neither to the east nor the west was there a connecting improved highway. That this highway served and would serve all the purposes of a feeder to the various stations and shipping point of the appellee within the district. That from it laterals were being constructed into an extensive and fertile timber region to the north; that already a mill had been started and a development of this great industry which would furnish large quantities of freight to the railroad was under way. That along the highway large acreage of fruits and berries were being planted, the products of which would of necessity be transported at least to a large extent over this railroad.

It is conceded that one of the greatest agencies for the development of any country or community is that of good roads. It cannot be successfully urged that if a community is developed and improved, it will not in turn improve and increase the business of the railway which serves that particular community. It goes without saying that no company of capitalists would for a moment consider investing their money in the building of a railroad which would lie wholly within a desert or barren waste, unless they had immediate prospects

of a development and improvement of the country which their road traversed. It is only as the adjacent territory by its improvement, development and industry grows and expands in wealth and thereby makes increasing demand upon transportation facilities that the railroad can flourish and prosper.

If it be said that the highway constructed by the district parallels the line of the appellees railway, then we answer that the only effect of this as shown by the testimony in this case and as established by experience, is to develop, improve and increase the prosperity of the community adjacent to the highway and railroad, and thereby necessarily result not in "an indirect, remote, doubtful and speculative benefit" to the property of the railroad company, but, as shown by the testimony and admission of the employees of the appellee's traffic department, as well as other testimony in the case, will result in an actual, direct, substantial and ever-increasing benefit, with the possible loss in small business and short hauls far more than offset by the continuing growth of the railroads general and more profitable business.

IN NO EVENT SHOULD PROPERTY OF THE RAILROAD COMPANY WHOLLY ESCAPE TAXATION FOR THIS PUBLIC IMPROVEMENT.

We have urged some of the reason why we believe that the benefits as originally fixed by the assessing authorities and later fixed and confirmed by legislative determination should be permitted to stand as against the attack made upon them in this suit but we further submit that in the event the court should find that the benefits as fixed are excessive, that in that event they should be reduced to a just and reasonable basis and the property of the appellee required to at least bear some portion of the burden of taxation for this public improvement. We insist that under the record in this case the language used by this court in the case of *Kansas City Southern Ry Co. et al.* v. *Road Improvement District No. 3 of Sevier County, supra,* is peculiarly applicable:

> "The evidence, as before outlined, falls short of showing that the assessment against the railway property was either palpably arbitrary or unreasonably discriminatory. The burden was on the railway companies to overcome the presumption attending the legislative determination, and this they failed to do; for, under the evidence produced, it is an entirely admissible view that the railway property will be substantially benefited by

the road improvement, and that the benefits are fairly assessed as between that property and the farm lands and town lots. True, the amount of benefits which will accrue to the railway property is largely a matter of forecast and estimate; but the same thing is true of the farm lands and town lots, and also of benefit assessments in general."

With this very apt statement of the situation in every case of benefit assessments for a public improvement of this character in view: That is that it is "largely a matter of forecasts and estimate" we submit that upon that basis it can after all be better and more definitely determined that a railroad will receive a measure of benefit than many other classes of property that are assessed on a much higher proportionate basis than the railroad in this instance. At least there is the tangible proposition of increased traffic that will unquestionably inure to the railroad by reason of the construction of a public highway whether it be parallel or otherwise while as to farms and town lots situate at a remote distance from the highway it is difficult indeed to find a substantial basis upon which to say that they will be directly benefited yet they must in proportion bear a heavier burden of taxation than the railway. We therefore submit that the legislative determination of benefits in this case against the property of the Missouri Pacific Railroad Company should be permitted to stand as fixed—less than 25 per cent of the average benefits assessed against all other real property in the district—or in any view of the case some substantial assessment should be upheld against this property owner and in any event that the decree herein should be reversed.

Respectfully submitted,

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